No. 91-1074

In the Supreme Court of the United States

OCTOBER TERM, 1991

ALLAN F. MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the district court's instruction that the jury could neither convict nor acquit petitioner without unanimous agreement lessened the government's burden of proving all the elements of a conspiracy offense.

2. Whether the district court's instruction describing certain criminal acts disjunctively improperly broadened and amended the indictment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is unreported, but the judgment is noted at 943 F.2d 1317 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1991. A petition for rehearing was denied on September 24, 1991. Pet. App. 2. The petition for a writ of certiorari was filed on December 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of making false and fraudulent statements in pension fund annual reports and in documents required to be kept under the Employee Retirement Income Security Act (ERISA), in violation of 18 U.S.C. 1027; and conspiracy to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to a one-year term of imprisonment. The court of appeals affirmed. Pet. App. 1.

1. In 1978, Joseph J. Higgins, a lawyer and former state legislator, formed the Omni Group, a mortgage brokerage company in Fort Lauderdale, Florida. In 1982, Omni entered into an agreement with the International Brotherhood of Teamsters Local 701 Pension Fund, an employee benefit plan subject to ERISA. The agreement provided that Omni would invest $20 million of Fund assets in commercial and residential real estate mortgages. The money was placed in a trust account and Omni was named as the trustee. Gov't C.A. Br. 2-4.

Petitioner is an owner of the Latado Fruit Company. In July 1983, that company purchased and then attempted to syndicate, as a tax-sheltered investment, a working citrus grove. Gov't C.A. Br. 5-6. In the fall of 1983, petitioner suggested to Higgins that he purchase the grove, and Higgins unsuccessfully attempted to obtain financing. *Id.* at 6-7. Higgins then turned to Omni and the Fund to secure a loan. *Id.* at 8. Under ERISA, Higgins was a fiduciary of the Fund and was therefore prohibited from borrowing money through Omni to purchase the grove. 29 U.S.C. 1002(21)(A), 1106(a)(1)(B). See Gov't C.A. Br. 3, 30-34. To circumvent that restraint and conceal his involvement, Higgins suggested that petitioner borrow the money from Omni, and petitioner agreed. *Id.* at 8-9.

Petitioner obtained a loan from Omni through Glades Citrus—another of petitioner's companies—and used that money to purchase the citrus grove. Gov't C.A. Br. 8-10. Glades Citrus then conveyed the property to Glades Grove, an unincorporated company controlled by Higgins. *Id.* at 10. After completing the transaction, petitioner and Higgins took steps to conceal Higgins' interest in the grove. Higgins' name did not appear on the loan documents, nor was Higgins' interest in the property ever disclosed to the Fund in any manner. *Id.* at 9, 11-12. Higgins made payments to petitioner, who then made the loan payments to Omni, camouflaging Higgins' involvement. *Id.* at 12.

In compliance with ERISA reporting requirements, the Fund's accountant prepared Form 5500 annual reports for the 1983 and 1984 tax years identifying Fund investments, including party-in-interest transactions. Gov't C.A. Br. 21. The Fund's accountant prepared those forms using Omni's monthly bank statements and loan documents. As a result of Higgins' and petitioner's actions, there was no disclosure of Higgins' interest in the Glades Citrus loan. *Id.* at 9, 21.

2. Count 1 of the indictment charged petitioner with conspiring to: (1) make false statements and omissions of fact in documents required to be kept by Title I of ERISA as part of the records of the Fund and in reports required to be published, in violation of 18 U.S.C. 1027; (2) embezzle and unlawfully convert money and property of the Fund to his own use, in violation of 18 U.S.C. 664; and (3) use the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341. Count 2 charged petitioner with making false statements and misrepresentations of fact "in the annual financial reports [Form 5500s] required to be published by the Fund * * * and in documents required to be kept by Title I of ERISA as part of the records of the Fund," in

violation of 18 U.S.C. 1027. See Gov't C.A. Br. App. 1, at 12.

The district court instructed the jury that to convict petitioner on Count 1, it "must unanimously agree upon which one of the three offenses the defendant conspired to commit." C.A. Record Excerpts 26. The district court also gave an instruction relating to multiple object conspiracies, based on the Eleventh Circuit's Pattern Jury Instruction 4.2 (see Gov't C.A. Br. App. 3, at 12), which stated in pertinent part as follows:

> [I]t is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit all of those substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the Defendant willfully conspired with someone to commit *one* of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon *which* of the three offenses the Defendant conspired to commit. If you cannot agree in that manner, you must find the Defendant not guilty.

C.A. Record Excerpts 21-22 (Instruction 12).

On Count 2, the ERISA violation, the district court instructed the jury that it must unanimously agree that petitioner had falsified either the annual reports or other ERISA-required documents or both. The court stated in pertinent part:

> Now, ladies and gentlemen, in determining whether the Government has proved the third element—this is on count two—beyond a reasonable doubt, you must be unanimous in your conclusion whether the false statements or concealments of fact were in the form 5500 annual reports *or* unanimous in your conclusion whether the false state-

> ments or conclusions were in documents required to be kept by ERISA *or* both.

C.A. Excerpts 29-30 (emphasis added). See also *id.* at 23 (Instruction 14).

Petitioner objected to the court's instruction on Count 2, which allowed the jury to convict on the basis of false statements in the Form 5500 annual reports *or* in other documents. Gov't C.A. Br. 55. At petitioner's request, the district court instructed the jury that a guilty verdict must be based on their unanimous agreement as to which documents petitioner had falsified. *Id.* at 55-58. Except for that objection, petitioner raised no objections to the court's instructions prior to the jury's commencement of deliberations. *Id.* at 55-60.

On the fourth day of deliberations the jury sent a note to the judge requesting clarification of the court's instructions. The note first laid out a portion of the multiple object conspiracy instruction and then stated:

> We understand that if we unanimously vote guilty on at least one offense, then the verdict would be guilty. What we don't understand is if that there is no unanimous agreement on any one offense, then is the defendant not guilty or do we continue to deliberate until there is an unanimous decision either way?

Pet. App. 6-7; C.A. Record Excerpts 31-32. Petitioner asked the court to instruct the jury that if it could not unanimously agree on which offense he had committed, it must return a verdict of "not guilty." Gov't C.A. Br. 61. The district court refused to give that instruction on the ground that it was not a "fair statement" of the law. *Ibid.* The court answered the jury's question by rereading its general unanimity instructions. The court observed that the jury must agree unanimously on which of the objects or offenses petitioner conspired to

commit, and it reread the previous jury instruction on a multiple-object conspiracy (Instruction 12), adding:

> Now, with regard to count one, in order to return a verdict of guilty verdict as to count one, in addition to the elements as laid out in instruction Number 11, you must also be unanimous that the Government ha[s] proven beyond a reasonable doubt that the defendant committed at least one of the objects or offenses as charged in count one. You must all agree in order to return a verdict of guilty upon which of the three offenses the defendant committed. In order to return a verdict of not guilty as to count one, you must all be unanimous in your finding that the Government has not proven beyond a reasonable doubt that the defendant committed any of the objects of the conspiracy.
>
> Now, if you are unable to reach unanimous agreement as to count one, or indeed, as to any other count, then you would be unable to return a verdict as to that particular count.

Pet. App. 8-9; C.A. Record Excerpts 34-35. The jury thereafter found petitioner guilty on the conspiracy and false statement counts, and the court of appeals affirmed petitioner's conviction without opinion. Pet. App. 1.

ARGUMENT

1. Petitioner contends (Pet. 8-14) that the district court responded incorrectly to the jury's questions concerning the need for unanimity. In particular, petitioner contends that the court's instruction lessened the government's burden of proof. That claim is without merit. The district court's supplemental oral instruction simply clarified that the jury's verdict—whether "guilty" or "not guilty"—must be unanimous.

The crux of petitioner's argument is that if the jury "cannot agree unanimously that the government proved a single object beyond a reasonable doubt, the only permissible verdict is not guilty." Pet. 12. That statement is plainly incorrect. Rule 31(a) of the Federal Rules of Criminal Procedure unambiguously states: "The verdict shall be unanimous." A verdict of guilty is appropriate only if the jury unanimously finds that the government has proved every element of the charged offense beyond a reasonable doubt. See, *e.g.*, *In re Winship*, 397 U.S. 358 (1970). A verdict of not guilty is appropriate only if the jury unanimously finds that the government has failed to prove at least one such element beyond a reasonable doubt. If the jurors cannot unanimously agree, then the result is that no verdict is rendered and the court must declare a mistrial. See, *e.g.*, *United States* v. *Arpan*, 887 F.2d 873, 877 (8th Cir. 1989).

Petitioner's mistaken understanding of the unanimity requirement leads him to take issue (Pet. 10-11) with a portion of the court's supplemental oral instruction. Petitioner challenges the sentence that stated:

> In order to return a verdict of not guilty as to count one, you must all be unanimous in your finding that the Government has not proven beyond a reasonable doubt that the defendant committed any of the objects of the conspiracy.

Pet. App. 8-9. Petitioner contends that this sentence "substantially lessened the government's burden of proof." Pet. 11. That statement, however, says nothing about the burden of proof. Moreover, it "must be considered in the context of the instructions as a whole and the trial record." *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 (1991). It is clear from its context that the instruction had no such effect.

The sentence is one part of a longer oral passage, set out above, in which the court first made clear that the jury could convict only if it unanimously found that the government proved one of the objects of the conspiracy. See Pet. App. 8 ("in order to return a verdict of guilty * * * you must also be unanimous that the Government ha[s] proven beyond a reasonable doubt that the defendant committed at least one of the objects or offenses as charged"). The statement that petitioner challenges simply expressed a corollary of that principle: the jury could acquit if it unanimously found that petitioner did not conspire to commit any of the identified objects or offenses. In that circumstance, the government would have failed to prove an essential element of the conspiracy offense. See 18 U.S.C. 371. Thus, read in context, the instruction simply restated the incontestable proposition that the jury's verdict—whether guilty or not guilty—must be unanimous.[1]

2. Petitioner also contends (Pet. 14-16) that the court's instruction concerning the substantive violation in Count 2— requiring unanimous agreement as to whether the false statements existed in either the Form 5500 annual reports *or* in documents required to be kept by ERISA *or* both—diverges from the offense described in the indictment. Petitioner observes that

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[1] Petitioner's contention (Pet. 8) that the appellate court's decision conflicts with decisions of other courts of appeals is not well founded. In each of the cases petitioner cites, the appellant successfully claimed that the district court committed reversible error by refusing to instruct the jury that it had to agree that the defendant had committed at least one of the charged offenses before returning a guilty verdict. See *United States* v. *Duncan*, 850 F.2d 1104, 1114 (6th Cir. 1988), cert. denied, 493 U.S. 1025 (1990); *United States* v. *Ballard*, 663 F.2d 534, 544 (5th Cir. 1981); *United States* v. *Gipson*, 553 F.2d 453, 458-459 (5th Cir. 1977). Here, by contrast, the district court gave just such an instruction to the jury.

the indictment charged those acts conjunctively, and he argues that the instruction's disjunctive form "impermissibly broadened and constructively amended the charge." Pet. 15. That argument is without merit. It is common—and entirely proper—for indictments to charge in the conjunctive but the jury to be instructed in the disjunctive, if the statute at issue is worded in the disjunctive. See *United States* v. *UCO Oil Co.*, 546 F.2d 833, 838 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); *Gerberding* v. *United States*, 471 F.2d 55, 59 (8th Cir. 1973). Moreover, as this Court recently reiterated in *Griffin* v. *United States*, 112 S. Ct. 466 (1991), "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id.* at 473, quoting *Turner* v. *United States*, 396 U.S. 398, 420 (1970). The court's instruction was consistent with that settled rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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